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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

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In re EMMETT LAMBERT FAUGHT

on Habeas Corpus.

C064849

(Super. Ct. No.  
09F02986)

Emmett Lambert Faught filed a petition for writ of habeas corpus in the Sacramento County Superior Court challenging a Board of Parole Hearings' (Board) decision in 2008 which found him unsuitable for parole. The trial court granted the writ and fashioned a certain remedy. On appeal, the Attorney General argues that the trial court's remedy was improper under *In re Prather* (2010) 50 Cal.4th 238 (*Prather*). We agree and modify the order.

#### BACKGROUND

In 1988 Faught pled guilty to second degree murder. He was sentenced 16 years to life in state prison with the possibility of parole. While in prison, the Board found Faught unsuitable

for parole on several occasions, including most recently in 2008.<sup>1</sup> Faught challenged the 2008 Board decision by writ of habeas corpus in the superior court.

On April 7, 2010, the superior court issued a 36-page decision in which it concluded that the administrative record before the Board was devoid of “‘some evidence’” of Faught’s current dangerousness. The trial court granted Faught’s petition and ordered the following remedy: “[T]he matter is remanded to the Board of Parole Hearings for a new decision finding petitioner suitable for parole, unless the Board holds a new hearing within 30 days and new evidence is presented of misconduct by petitioner in prison since the 2008 parole hearing that would support a determination of unreasonable risk of danger if released on parole (see In re Gaul (2009) 170 Cal.App.4th 20).”

After the trial court granted Faught’s petition, the California Supreme Court decided *Prather*, a case which discusses the appropriate judicial remedy for a Board’s erroneous parole denial. (*Prather, supra*, 50 Cal.4th at pp. 244, 255-258.) In the wake of *Prather*, the Attorney General contends that the trial court’s remedy was improper.<sup>2</sup>

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<sup>1</sup> The record does not reveal any further Board decision beyond the 2008 decision.

<sup>2</sup> The superior court’s determination that the Board’s 2008 decision was unsupported by some evidence of Faught’s current dangerousness is not contested by the parties, and is not before us on appeal.

## DISCUSSION

The propriety of the trial court's remedy under *Prather* presents a pure question of law which we review de novo. (See *People v. Rells* (2000) 22 Cal.4th 860, 870 [recognizing that pure matters of law are examined de novo].) We agree with the Attorney General that the trial court's remedy was improper under *Prather*.

A prisoner whose parole denial is not based on some evidence of current dangerousness is entitled to a new parole-suitability determination. (*Prather, supra*, 50 Cal.4th at p. 244.) While a court may direct the Board to conduct a new parole-suitability proceeding, under *Prather*, a court may not, as the trial court did here, direct the Board to consider only whether new evidence presented since the parole hearing supports a determination of the prisoner's current dangerousness. (*Id.* at pp. 244, 255-258.) As *Prather* explained, "[o]rders that are designed to limit the Board's consideration of evidence to only recent and specified changes in the existing record before the Board necessarily limit that body's consideration of *all* relevant factors, thereby improperly curtailing the Board's exercise of the authority it possesses under the governing statutes." (*Id.* at p. 255, original italics.) Moreover, such orders preclude the Board's "consideration of the full record and thereby ensure[] that the new evidence will be 'evaluated in

a vacuum.'"<sup>3</sup> (*Ibid.*) Accordingly, a decision granting habeas corpus relief in this context "should direct the Board to conduct a new parole-suitability hearing in accordance with due process of law and consistent with the decision of the court, and should not place improper limitations on the type of evidence the Board is statutorily obligated to consider." (*Id.* at p. 244.)

In light of *Prather*, the trial court erred in directing the Board to consider only whether new evidence since the 2008 parole hearing supports a determination of Faught's current dangerousness. Therefore, the trial court's judgment must be modified.

Faught concedes the trial court's remedy was improper under *Prather*. Before remanding the case, however, Faught invites this court to independently review the record evidence and issue an appellate decision finding no evidence of Faught's current dangerousness so that our decision (as opposed to the trial court's) may serve as a guide for the Board in a new parole-suitability determination. We reject Faught's invitation.

The parties do not challenge the trial court's decision that the record lacked some evidence of current dangerousness, and hence there is no purported error for us to review, nor a controversy for us to resolve. (See *In re Heather B.* (2002) 98 Cal.App.4th 11, 15 [stating that there was "nothing for this

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<sup>3</sup> *Prather* rejected *Gaul* which the trial court relied upon in fashioning its remedy. (*Prather, supra*, 50 Cal.4th at p. 253.)

court to review" because appellant did not claim that the trial court erred in its order below]; *Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 10 ["It is well settled that an appellate court will decide only actual controversies"].) Moreover, Faught has not filed a cross-appeal and thus his invitation to replace the trial court's decision with our own is not properly before us. (See *Hutchinson v. City of Sacramento* (1993) 17 Cal.App.4th 791, 798-799 [respondent's argument on appeal not considered when the respondent did not file a cross-appeal and the argument would not preserve the trial court's judgment].) Finally, even assuming Faught had filed a cross-appeal, it would be his burden, as an appealing party, to demonstrate that the trial court erred in its decision (*Keyes v. Bowen* (2010) 189 Cal.App.4th 647, 655; *State Farm Fire & Casualty Co. v. Pietak* (2001) 90 Cal.App.4th 600, 610), which burden he cannot meet given that he claims no error.

#### DISPOSITION

The order granting the petition for habeas corpus is modified by striking the remand instructions and replacing them with the following: "The matter is remanded to the Board of Parole Hearings for further proceedings consistent with due process and the decision of the trial court. (*In re Prather* (2010) 50 Cal.4th 238.)" As modified, the order is affirmed.

The stay issued by this court, having served its purpose,  
is vacated upon the finality of this opinion.

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NICHOLSON, J.

We concur:

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BLEASE, Acting P. J.

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MAURO, J.